

**FILED ELECTRONICALLY**

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
CONSUMER BANKERS ASSOCIATION	)	CG Docket No. 02-278:
	)	DA 04-3836
Petition for Declaratory Ruling with Respect to	)	
Certain Provisions of the Wisconsin Statute	)	
and Wisconsin Administrative Code	)	

**COMMENTS OF THE MORTGAGE BANKERS ASSOCIATION**

The Mortgage Bankers Association (“MBA”)<sup>1</sup> appreciates the opportunity to comment on the Federal Communications Commission’s (“the Commission”) request for comments resulting from the Consumer Bankers Association’s petition for a declaratory ruling regarding Wisconsin’s Statute and Administrative Code as it relates to *interstate* telephone solicitations. MBA supports preemption of Wisconsin’s law to the extent it is inconsistent with the Telephone Consumer Protection Act (“TCPA”).

As you are aware, the TCPA provides exemptions to the Do Not Call restrictions for established business relationships (“EBRs”). The TCPA exempts from the Do Not Call prohibitions:

---

<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation’s residential and commercial real estate markets; to expand homeownership prospects through increased affordability; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters excellence and technical know-how among real estate finance professionals through a wide range of educational programs and technical publications. Its membership of approximately 2,900 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the mortgage lending field. For additional information, visit MBA’s Web site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

(1) telephone solicitations that are based on a consumer's past inquiry or application during the three months preceding the call, regarding the party's products or services;

(2) calls to persons with whom the caller has engaged, within 18 months prior to the call, in a purchase or transaction; and

(3) calls from an affiliate entity that the consumer reasonably would expect to be included in the EBR given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.<sup>2</sup>

Wisconsin's telemarketing law and related regulation are more restrictive and prohibit a telephone solicitor from making both intrastate and interstate sales calls to a telephone number that appears on the Wisconsin Nonsolicitation Directory Listing.<sup>3</sup> Wisconsin law does have exemptions to this rule, but those exemptions are substantially narrower than those provided under the federal law.

In particular, Wisconsin's law does not permit calls to a residential subscriber who has made an inquiry or application without obtaining an express request to be called in return.<sup>4</sup> Under the TCPA, such an inquiry or application would allow the telemarketer to call the consumer to respond to the inquiry.

It appears that Wisconsin law prohibits a telemarketer from calling a residential subscriber with whom it completed a purchase or transaction, but where the company does not retain the subscriber as a "current client."<sup>5</sup> We believe this provision would prohibit a mortgage broker, for example, from contacting a recent client to inform him/her of new products or refinance

---

<sup>2</sup> See, 47 CFR § 64.1200(f)(3) (2005).

<sup>3</sup> Wis. Stat. § 100.52(2004); Implementing Regulations: Wis. Admin. Code, Agriculture, Trade and Consumer Protection, §§ 127.02-127.20 and 127.80-127.84.

<sup>4</sup> *Id.* at §100.52(4)(a)(2) and 6(a).

<sup>5</sup> "Frequently Asked Questions," Wisconsin Department of Agriculture, Trade and Consumer Protection website. In response to the question "Does the No Call List stop all telemarketing calls?" the website provides the following exemption: "calls made to an existing customer – for example, calls from: the bank you have a checking account with, your phone company or your credit card company." No exemption is provided for other callers (e.g., mortgage brokers or real estate agents) with whom the consumer recently completed a transaction. See, <https://nocall.wisconsin.gov/web/includes/help/consumerfaq.asp#allcallsstopped> (last visited on February 2, 2005).

opportunities. In contrast, under the TCPA, the mortgage broker would be permitted to call the former client up to 18 months after the consummation of the transaction.

Wisconsin's "current client" category includes only "a person who has a current agreement to receive, from the telephone caller or the person on whose behalf the call is made, property, goods or services of the type promoted by the telephone call."<sup>6</sup> Such language implies that the caller would not be permitted to offer different goods or services. For example, a bank would not be able to offer credit cards to its mortgage customers. Under the TCPA, a caller with an EBR would be able to offer different products or services.<sup>7</sup>

Wisconsin law prohibits the use of an electronically prerecorded message in a telephone solicitation without the consent of the recipient of the telephone call.<sup>8</sup> Under the TCPA, a telemarketer would be permitted to leave a prerecorded message provided it had an established business relationship with the consumer.

Wisconsin law does not permit calls from an affiliate of the entity with whom the residential customer has an existing relationship.<sup>9</sup> Under the TCPA, certain affiliates are permitted to call.

Wisconsin law prohibits making a telephone solicitation to a nonresidential customer if the nonresidential customer has provided notice to the telemarketer by mail that the nonresidential customer does not wish to receive telephone solicitations.<sup>10</sup> No such restriction exists in the TCPA.

The conflict between Wisconsin and federal Do Not Call statutes and regulations create greater complexity, compliance costs and risk for the mortgage industry and other telemarketers. Effectively, mortgage companies

---

<sup>6</sup> Wis. Admin. Code, Agriculture, Trade and Consumer Protection, §127.80(2).

<sup>7</sup> 47 CFR § 64.1200(f)(3).

<sup>8</sup> Wis. Stat. § 100.52(4)(a)(1).

<sup>9</sup> *Id.* at § 100.52(6)(b).

<sup>10</sup> *Id.* at § 100.52(4)(a).

wishing to do business in Wisconsin would be subject to more stringent overall requirements than those operating in other states. Wisconsin's restrictive law frustrates the federal objectives of creating a uniform national telemarketing rule. As a result, we respectfully support the preemption of Wisconsin's Statute and Administrative Code to the extent they prohibit *interstate* telephone solicitations otherwise permissible under the TCPA and its implementing rules (as described above).

Respectfully submitted,

A handwritten signature in black ink, reading "Jonathan L. Kempner". The signature is fluid and cursive, with the first name "Jonathan" being more prominent and the last name "Kempner" following in a similar style.

Jonathan L. Kempner  
President and Chief Executive Officer  
Mortgage Bankers Association  
1919 Pennsylvania Ave, NW  
Washington, DC 20006  
(202)557-2700

Dated: February 3, 2005